No. 68-30

In The

APPELLATE COURT OF ILLINOIS

Third District

103 I.A. 2/65

CHARLES S. FREDERICKS and BERNADINE A. FREDERICKS,

Plaintiffs-Appellees,

vs.

FREDERICK R. SCHAAB,

Defendant-Appellant.

Appeal from the Circuit Court of Tazewell County, Illinois

Honorable Henry J. Ingram Judge Presiding

Abstract

SCHEINEMAN, J.

The plaintiffs were injured in a multiple-car accident and sued the three defendants. The occurrence took place at night and the cars were all headed north, Schaab's was first, stopped at a side road intersection allegedly intending to make a left turn. Fredericks was stopped behind Schaab, Mishler was stopped behind Fredericks, and defendant Sill crashed into the rear car causing them all to telescope together and the plaintiffs were injured.

The jury found in favor of defendant Mishler, but returned verdicts for plaintiffs against the other two defendants. Schaab brings this appeal contending there was no evidence of negligence on his part, and that there were errors in rulings on evidence and in the instructions. We refer only to evidence which may tend to support the verdict.

Defendant Schaab stopped at an intersection where the side road turned off at an angle, which appears to be about

45 degrees but certainly was much less than 90 degrees. It should have required only a few seconds to make the turn. The only car approaching from the north was about a mile away when Fredericks pulled up behind the stopped car of Mr. Schaab.

Fredericks then saw the great distance of the closest approaching car and he sounded his horn and shouted, trying to get Schaab to move. Schaab heard these signals but ignored them. He did not have a turn signal operating and gave no indication of his intention. Then the Mishler car stopped behind Fredericks and still Schaab had not moved. The south-bound car had not yet passed but was becoming closer and another car had come on the intersecting road and was stopped at the highway.

It is argued for this appellant that the evidence does not show any neglgence on his part--that he merely created a condition and Sill's negligence was the sole proximate cause, citing Wooff v. Henderson, 46 Ill. App. 2d 420. That case involved a car stopped to make a left turn, but in broad daylight, and the opinion appears to indicate there was no unreasonable delay. The present case is quite different. Here Schaab negligently caused almost a traffic jamb by stopping and waiting when there was no need. When the Frederick car came upon him and signalled, the approaching car was still nearly a mile away, in fact Mrs. Mishler testified that when they first pulled up and stopped there was a car coming down the Germantown Hill. A photograph in evidence shows that the hill is so far away there was, even then, plenty of time to make the left turn.

Schaab knew he was wrong but his only excuse is that he did not realize his error until the approaching car dimmed its lights.

His judgment of distance was so bad we must regard it as justifying the jury in holding that he was negligent. Whether his negligence was a proximate cause is a question properly submitted to the jury.

"Questions which are composed of factors sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause (require) leaving such questions to a fact-finding body. To withdraw such questions from the jury is to usurp its function." Cardona v. Toczydlowski, 35 Ill. App. 2d 11.

Similar statements appear in Ney v. Yellow Cab Co., 2 Ill. 2d 74; Schiff v. Oak Park Cleaners & Dyers, Inc., 9 Ill. App. 2d 1.

When an approaching car is descending a slope toward the observer, the high beam is aimed below a level line of sight, somewhat like the low beam. We can conceive of no excuse for Schaab's failure to make a reasonable judgment of distance when the Mishler car arrived, even though he could not do so before that time.

As to the alleged error in rulings on evidence, the state trooper who investigated the accident, was called as a witness for Schaab. He was asked by defense counsel if, in his observation of Schaab, there was anything abnormal or unusual about him. Answer: "No."

On cross-examination counsel for plaintiffs inquired whether he had previously made statements to the contrary. He answered that he had said on the report that drivers of the first and fourth cars had been drinking alcohol previous to the accident. Plaintiff's counsel did not then pursue the subject, but attorneys for other parties did continue on the subject.

Thus the matter of drinking got into the case, and could not have been avoided. Plaintiff's attorney had the right to impeach the witness by showing prior inconsistent statements, and the court certainly would allow him to lay the foundation for impeachment.

With it already in the record, the subject was pursued when Schaab took the stand. Plaintiff's attorney cross-examined him about his drinking on that day. The witness told of having a beer in the morning and more in the afternoon at his mother's house and he stopped at two taverns that night and he told of having a shot of whisky followed by a 12 ounce glass of beer not very long before he went out on the highway.

Schaab's attorney objected to this line of inquiry and later moved to strike it, but the motion was overruled.

The appellant asserts that it was prejudicial error to admit evidence of drinking citing Royer v. Graham, 45 Ill. App. 2d 22; Shore v. Turman, 63 Ill. App. 2d 315 and Kitten v. Stodden, 76 Ill. 2d 177. None of these cases state any rule as to admissibility of such evidence. There was testimony regarding a party's drinking in all of these cases but not to the extent of proving intoxication.

The first citation resulted in affirmance, the court

holding it was proper to refuse to give instructions on intoxication such as IPI 12.1 when the evidence did not show intoxication. The other two cases reversed the trial court for giving such an instruction under similar conditions. That question is not involved in this case as no request was made for a similar instruction.

There is probably a wide-spread opinion that drinking and driving do not mix, and thus may affect some jurors' attitude, but we do not see how it could have been avoided legally in this case.

The appellant concedes that the trial court has a large discretion as to the scope of cross-examination, but claims abuse in this case. We have already pointed out that it was properly in the cross-examination of the state trooper. In view of that fact the trial judge was justified in regarding the prejudicial effect as already present in the case, so that he would not make questionable rulings in a futile effort to keep it out.

In Patarozzie v. Prairie States Oil & Grease Co., 71 Ill. App. 2d 155, there was offered direct testimony of several witnesses that, during the four or five-hour period prior to the accident, a party had visited several taverns in the area, where he consumed substantial quantities of alcoholic beverages. The trial court excluded the evidence which resulted in a reversal. We express no opinion as to whether that case should apply under the conditions of the case at bar, but hold that under the circumstances previously noted, there was no reversible error in the trial court's rulings on evidence.

The court gave the standard instructions on the issues of

the case stating the charges of negligence in abbreviated form, as required by rules announced in Signa v. Alluri, 351 Ill. App. 11, also stating that the defendant denied all of the charges of negligence. The appellant argues that the evidence does not tend to support the charges, or at least some of them. We are constrained to hold that the evidence justified a finding by the jury that the defendant was negligent. It may be argued that some charges are not so clearly proved as others, but the instruction was an accurate statement of the issues and, even if the evidence in support of some of them was thin and the argument on them somewhat farfetched, there was no error in giving this instruction. Defense counsel was so strongly of the opinion that the court should have directed a verdict for him that he seems to argue there was no issue in the case. He assumes that Schaab was making a left turn and did give a signal, which merely ignores the evidence to the contrary which obviously was more persuasive to the jury.

Similar complaint is made as to an instruction stating the law as against stopping on the pavement. Cited in the case of Dromey v. Interstate Motor Freight Service, 121 Fed. 2d 361, which held that rule of law did not apply to "a momentary stop preparatory to making a left turn." There was no "momentary stop" shown by evidence in this case so that the citation does not apply.

Objection is also made to giving only the first paragraph of IPI 12.05 that, if defendant was negligent, it is no

defense that someone else may have contributed to cause the injury. The second possible paragraph in that instruction states that if the negligence of someone else was the sole proximate cause, the verdict should be for defendant Schaab. The court refused to give this part which was correct in view of the evidence. Without the negligence of Schaab there would have been no collision.

It is also said the use of intoxicating liquor was not alleged anywhere in the pleadings. It may be an issue in a case even though it is not mentioned in the pleadings. Shore v. Turman, 63 Ill. App. 2d 315 at 322-323.

There being no reversible error in the record, the judgments are affirmed.

Affirmed.

Alloy, P.J., Stouder, J. concur

No. 68-30

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

HOWARD B. QUINN, Plaintiff-Appellant, v. CHARLES E. LARSON and FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporation, Defendants-Appellees.	) Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois.

MR. PRESIDING JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The plaintiff-appellant, Howard B. Quinn, filed suit in the Circuit Court of Lake County on June 29, 1967, against Charles E. Larson, Sheriff of Lake County, and Federal Savings and Loan Insurance Corporation to recover compensatory damages in the sum of $1,000,000.00 and punitive damages against Federal only in the sum of $500,000.00 for an alleged wrongful levy and sale of certain personal property. The trial court granted defendants' motion to dismiss and this appeal followed.

On February 11, 1964, Federal confessed judgment against Quinn in the amount of $457,702.77 in the Circuit Court of Cook County and caused execution to be issued thereon that was subsequently directed to the Sheriff of Lake County. On October 15, 1964,

Quinn filed a motion to open up the judgment and stay the execution. On November 19, 1964, the court denied Quinn's motion but permitted him to file a counterclaim instanter. On December 22, 1964, the court denied Quinn's petition for a rehearing and he appealed from both that order and the order of November 19. The Appellate Court for the First District dismissed the appeal on the grounds that those orders were not final and appealable since Quinn's counterclaim was unresolved. Federal Savings & Loan Ins. Corp. v. Quinn, 81 Ill. App. 2d 299.

In the meantime, the Sheriff of Lake County had proceeded with the execution issued on the Cook County judgment and on November 26, 1964, levied and sold certain farm machinery, livestock and other chattels owned by Quinn. Quinn filed an earlier suit in Lake County against Larson and Federal that also alleged that the levy and sale was wrongful and sought compensatory damages in the sum of $800,000.00 and punitive damages in the sum of $1,000,000.00. That suit was based on Quinn's theory that Federal, as an agency of the United States, could only bring suit in federal court and that Federal was a foreign corporation and had failed to qualify to do business in Illinois. The trial court in that case also granted the defendants' motion to dismiss and we affirmed that decision in Quinn v. Larson, 77 Ill. App. 2d 240.

Quinn's present suit appears to be based on the opinion of the First District in 81 Ill. App. 2d 299. In that case the court quoted the then Section 50 (2) of the Civil Practice Act (Ill. Rev. Stat. 1963, ch. 110, sec. 50 (2)) to the effect that an order which adjudicates fewer than all issues in a lawsuit is not enforceable or appealable

without an express finding that there is no just reason for delaying enforcement or appeal. Quinn contends that since there was no such express finding in the judgment entered on February 11, 1964, such judgment was legally unenforceable, and the execution, levy and sale thereunder was improper.

It is not necessary for us to consider the merits of this contention since Quinn's present theory was available at the time he filed his earlier Lake County suit and is thus barred by the doctrine of res adjudicata. The applicable rule was stated in Freeman & Co. v. Regan Co., 332 Ill. App. 637, 644, 645, as follows:

> "A mere change in the theory of what is essentially a single cause of action may not be sufficient to prevent the application of the doctrine of res adjudicata, especially where the questions raised in the second action might have been litigated in the first suit. A party cannot preserve the right to bring a second action after the loss of the first merely by having circumscribed and limited the theories of recovery opened by the pleadings in the first."

Quinn argues that the doctrine is not applicable since neither the parties nor issues were identical in the two suits. In the earlier case, Howard B. Quinn and Charlotte J. Quinn were party plaintiffs, whereas in the instant case only Howard B. Quinn is a named plaintiff. It is obvious, however, that both suits involved the same alleged wrong on the part of the same defendants to the same property. Either Charlotte Quinn was a proper party to both suits or to neither. The doctrine of res adjudicata cannot be evaded by the simple expedient of juggling parties to the litigation.

We feel that the issues in both cases were identical, i.e., the improper seizure and sale of the property. Although Quinn's

second Lake County suit was based on a new theory it was no more than an attempt to relitigate what had already been adjudicated.

In addition, the second suit was subject to dismissal pursuant to Section 48 (1) (c) of the Civil Practice Act since it appears that Quinn on June 27, 1967, two days before filing this action, had filed an amended counterclaim in the Cook County proceeding that included allegations identical with this complaint. Ill. Rev. Stat. 1967, ch. 110, sec. 48 (1) (c).

For the reasons stated the order of the Circuit Court of Lake County will be affirmed.

JUDGMENT AFFIRMED.

DAVIS and MORAN, JJ., concur.

NO. 68-18

103 I.A. 2-26

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

Abstract

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
L. G. YOUNG,
Defendant-Appellant.

Appeal from the Circuit Court of Ogle County

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Defendant appeals from a judgment of the Magistrate finding him guilty of operating a motor vehicle after revocation of license (Ill. Rev. Stats. 1967, Ch. 95½, Sec. 6-303) and sentencing of three months in Vandalia.

Defendant asserts as errors that he was not advised of right to counsel, either at arraignment or at trial; and that the charge was erroneous in stating a different date of the offense (August 7, 1967) charged than the date proven (August 8, 1967).

The plaintiff agreed that defendant was entitled to be advised of his right to counsel, but argued that the fact that defendant had sought to retain an attorney evidences his knowledge of his right to an attorney. The further argument is made that the record does not show any request for a continuance to secure counsel and that, in any event, refusal to grant a continuance lies within the court's discretion with no showing of prejudice to the defendant; and it is also argued that the variance in

the dates is not reversible error under the circumstances, since time is not an element of the offenses charged.

The record does not contain a transcript of proceedings at the arraignment. The transcript of the proceedings at trial includes the testimony of two police officers who saw the defendant driving on August 8, 1967, and the certified record of the revocation, but does not include any colloquy with the court relative to waiverof counsel. The common law record indicates that the trial proceeded without counsel and without a jury. The transcript includes a statement by both the State's Attorney and the defendant which showed that defendant was granted a thirty day extension by telephone and the case was set for October 4, 1967; that on that date he appeared late and the matter was continued for one week; that the defendant called and stated he was unable to secure a ride and the matter was continued to the trial date; that on the trial date, defendant appeared without counsel; that before the trial date a lawyer called the police officer advising the State he would not appear because defendant had given him a "bad check" for his fee, and the lawyer again called on the trial date, stating to the police officer that he was withdrawing from the case because he had not received any money.

We cannot say, from the record, that defendant understandingly waived his right to counsel. Guided by People v. McGrath, 85 Ill. App. 2d 388, 391-392 (1967), (followed in People v. McKenzie, 89 Ill. App. 2d 157, 159-160 (1967), 231 N.E. 2d 702), we reverse the judgment of the trial court and remand with directions to reinstate this cause for the furnishing of evidence as to what actually transpired with reference to the absence of waiver of counsel, and as to the denial of a continuance in the present record, under the provisions of Supreme Court Rule 323 (c) (d).

Included on his (

To further guide the court below, we find that it was not necessary for the People to prove the time of the offense on the precise day charged. The time was not an ingredient of the offense charged in view of the circumstances that only one offense was observed by the arresting officers and there is nothing to suggest the driving by the defendant at any other time or place which might cause defendant to be placed in double jeopardy. The People v. Kircher, 333 Ill. 200, 204 (1928); Ill. Rev. Stats. 1967, Ch. 95½, Sec. 6-303.

Reversed and remanded with directions.

MORAN, P.J. and ABRAHAMSON, J. concur.

No. 52217

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

103 I.A. 2 4/6

GEORGE BROWN, Plaintiff-Appellee, -vs- ANGELO JANNOTTA, Defendant-Appellant.	Appeal from the Circuit Court of Cook County. Honorable George Leighton, Presiding.

George J. Moran, J.

Defendant appeals from judgment entered by the Circuit Court of Cook County following a jury verdict for the plaintiff in the amount of $6,500.00.

This action arises out of an automobile accident in which the vehicle driven by the plaintiff, George Brown, was struck from behind by the vehicle driven by defendant, Angelo Jannotta. The questions raised on appeal by the defendant are whether the remarks of plaintiff's counsel in his closing argument were improper and prejudicial to the extent that they require reversal and whether the defendant is precluded from raising the issue of said remarks by reason of the fact that no objection was made in the trial court.

The general rule is that if timely objection is not made, the question is not open for consideration on appeal. Lindroth v. Walgreen Co., 407 Ill 121 at 136. However, this rule is not applied where the argument is so seriously prejudicial that it calls for intervention. The court in Belfield v. Coop, 8 Ill 2d 293, said at page 313:

> "If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error even though no objection was made and no ruling made or preserved thereon."

We thus agree with defendant that the effect of his failure to make timely objections to the closing argument of plaintiff's counsel is dependent upon an inquiry into the degree of prejudice, if any, present in said ument.

included on ms a

The basis of the appeal in the instant case are comments made by plaintiff's counsel in his closing argument concerning the reliability of the defendant's three witnesses, namely, Officer Martin, the policeman who prepared the accident report, Dr. Emanuele, the plaintiff's family physician, and the defendant himself. Concerning Officer Martin, plaintiff's counsel said:

> "Now what influence there may have been brought to bear on Officer Brown, I do not know -- Officer Martin, I do not know, but in my experiences in the affairs of life, the brain of influence on City of Chicago police officers is not uncommon and not unheard of, and not difficult to do. Whether it was done, in fact, I do not know, but, I do not think anything that Officer Martin says is material one way or another."

Later in his argument, plaintiff's counsel commented:

> "What kind of mysteryman is this fellow (the defendant)?
>
> And incidentally, if there is some influence brought to bear against Dr. Emanuele, is it conceivable he has something to do with it?
>
> But, I surely do not know much about him. You do not, either; and it strikes me as strange that, ah -- I have seen things like that, but it is of some interest to me what kind of a figure is this fellow. What does he really do? Who is he and what has he been doing behind the scenes in this case.
>
> Would you not like to know that?"

The defendant now argues that these remarks presented to the jury a web of conspiracy woven by the defendant, Dr. Emanuele, and Officer Martin in their effort to deprive the plaintiff of justice by means of perjured testimony. A reading of these remarks in the light of the testimony given at the trial does not suggest the type of case indicated by the court in Belfield, supra.

The testimony of Officer Martin and the plaintiff contradicted each other on the question of whether the plaintiff indicated to the officer at the scene of the accident that he was injured. Officer Martin said that no injuries were reported to him and, in fact, he took no statements whatsoever.

The plaintiff testified that the officer asked him if he was hurt and the plaintiff answered, "Well, I hurt, I'm shook," and the officer then advised him to see a doctor. The police officer testified that he vaguely remembered the accident and that he knew there was no injury reported to him, not from his independent recollection, but from the fact that it was not included on his accident report. On cross

examination the police officer stated that if a driver reports that he has been shaken up, in the majority of cases it would be included in the report. He also admitted that if an injury is reported, there is more work required on his part in completing the accident report. Although he admits that he handled from 8,000 to 9,000 accidents subsequent to the one in question, he stated that at the scene the surface of the road was wooden blocks which were extremely slick. However, his accident report indicated that the surface was asphalt. In short, it is obvious that he had no independent recollection of the accident.

The testimony of Dr. Emanuele and the plaintiff conflicted on whether the doctor had treated the plaintiff for his hurt and shaken condition immediately following the accident. Dr. Emanuele stated that his records showed that the plaintiff was not treated by him immediately following the accident. The record librarian of Oak Park Hospital where Dr. Emanuele is on the staff, testified that X-rays were taken of the plaintiff and in the normal routine X-ray reports would have been sent to Dr. Emanuele who was shown on the hospital records to be the referring doctor. The cross examination of Dr. Emanuele revealed that he did not like to be involved in court cases and that he referred all accident cases to another doctor, including those in which his regular patients were involved. It is possible then to infer that his resoluteness in staying out of court cases could be an influencing factor which caused him to contradict the plaintiff's testimony.

The evasiveness of defendant Angelo Jannotta while testifying justified the name tag of "mystery man" and surely brought certain unanswered questions to the minds of the jurors. His testimony throughout cross examination shows an evident reluctance to testify. For example:

> "Q. Let me ask the question again; earlier in the day, what activities were you carrying on prior to this occurrence; that is, what were you doing and that sort of thing?
>
> A. I do not recall.
>
> Q. What was your occupation at that time?
>
> A. Self-employed.
>
> Q. Doing what?
>
> A. I am a salesman.

Q. What do you sell?

A. I sell everything.

Q. What were you selling at that time?

A. I do not recall.

Q. You don't recall what your business was?

A. No.

Q. You have no idea what product you were selling?

A. That is correct."

Throughout the rest of his testimony, the defendant's answers were equally evasive.

It should be borne in mind that wide latitude is generally allowed counsel in presenting their arguments and deducing inferences from the evidence. The boundaries within which counsel must limit their arguments is given by the court in Chicago Union Traction Co. v. O'Brien, 219 Ill 303, at page 307:

> "The jury are to decide questions of fact, and the purpose of argument by counsel is to induce them to decide such questions in accordance with the claims and theories of counsel. Where witnesses contradict each other, the object of argument is to influence the jury to believe the testimony of one and to disregard or disbelieve the testimony of the other. To that end counsel have a right to present to the jury, in argument, the inconsistencies and contradictions of witnesses, to comment on their manner of testifying, their appearance upon the stand, the improbability of their statements, and anything else which will show that they are mistaken or unworthy of belief, and to denounce a witness as unreliable or untruthful when subject to any of the tests for determining his credibility. It is the right of counsel to draw any and all proper inferences arising from the evidence in the case, tending to show that the testimony of witnesses is untrue."

The cross-examination of Officer Martin and Dr. Emanuele uncovered reasons why each could give testimony inconsistent with that of plaintiff's. The cross examination of the defendant, Angelo Jannotta, revealed a decided evasiveness and a reluctance to answer questions. It would thus be a legitimate inference of plaintiff's counsel that there were reasons why the jury should not believe them. Such argument is permissible. Chicago Union Traction v. O'Brien, supra.

The two short excerpts from plaintiff's counsel's argument offered by the defendant to show how the argument infers that the defendant had conspired or attempted to conspire with his witnesses, Dr. Emanuele and Officer Martin, to deprive the plaintiff of justice by means of perjured testimony are not enough to substantiate this

charge. An inference that a witness has been influenced is not the same as an inference of subornation. The testimony given by Dr. Emanuele, Officer Martin and this defendant legitimizes the inferences that are made by plaintiff's counsel in his closing argument. This case does not present the clear case of impropriety and serious prejudice as required by Belfield, supra.

The attitude of this court toward review of improper argument was given in Wells v. Gulf, Mobile & Ohio Railroad Co., 82 Ill App 2d 30, at page 34:

> "The rule governing review of assignments of error based upon alleged improper argument to the jury is clearly stated in Belfield v. Coop, 8 Ill 2d 293, 134 NE2d 249. The character and scope of argument to the jury is left very largely to the trial court, and every reasonable presumption must be indulged in that the trial court has performed his duty and properly exercised the discretion vested in him. North Chicago St. R. Co. v. Cotton, 140 Ill 486, 29 NE 899. The attitude and demeanor of counsel and the general atmosphere of the trial are observed by the trial court, and cannot be reproduced in the record on appeal. The trial court is, therefore, in a better position than a reviewing court to determine the prejudicial effect, if any, of a remark made during argument, and unless clearly an abuse of discretion, its ruling should be upheld. City of Chicago v. Chicago Title & Trust Co., 331 Ill 322, 163 NE 17."

Department of Public Works & Buildings v. Diel, 89 Ill App 2d 130; Gillson v. Gulf, Mobile & Ohio Railroad Co., 94 Ill App 2d 170.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

Judgment Affirmed.

CONCUR:

Honorable Joseph H. Goldenhersh

Honorable Edward C. Eberspacher

Case No. 68-25

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1968

103 I.A.2 485

ALLSTATE INSURANCE COMPANY, Plaintiff-Appellee, vs. EMIL P. JOHNSON, Administrator of the Estate of CHARLES E. JOHNSON, Deceased, and EDNA JOHNSON, Defendants-Appellants.	)	Appeal from the Circuit Court of the Tenth Circuit of Illinois, Peoria County. Honorable Robert E. Hunt, Presiding Judge

STOUDER, J.

Plaintiff-Appellee, Allstate Insurance Company commenced this proceeding in the Circuit Court of Peoria County seeking to set aside an arbitration award in favor of Defendants-Appellants Emil Johnson and Edna Johnson. In the same proceeding the defendants sought to have the award confirmed and judgment entered thereon. The trial court granted the relief sought by Plaintiff, set the award aside and refused to enter judgment on the award as sought by defendants from which judgments the defendants have appealed.

The facts are undisputed. Charles Johnson, son of appellants, died as a result of a collision on December 31, 1964 between an automobile he was operating and an uninsured automobile. The automobile which Johnson was operating was leased to Johnson's employer and was covered by a liability policy issued by Bituminous Casualty Corp. a party not directly involved in this appeal. Johnson owned an automobile (not involved in the accident) which was covered by a liability policy issued by appellee Allstate. Each of the policies included uninsured motorist coverage and arbitration provisions related thereto. Pursuant to such arbitration

382

provisions appellants requested the appointment of an arbitrator by the American Arbitration Association and an arbitrator was appointed. At the first hearing scheduled before the arbitrator the appellee appeared under what it characterizes as a limited appearance and objected to the arbitrator's power to determine questions of coverage. The arbitrator denied such objection, proceeded to hear evidence and appellee continued to participate in the proceedings. The arbitrator in his award found the issues in favor of appellants and also held that primary coverage was afforded by the Bituminous Casualty policy. However, the arbitrator then awarded appellants $10,000.00 against Bituminous Casualty and $10,000.00 against Allstate for a total of $20,000.00.

In its application to the Circuit Court to vacate the arbitration award, appellee alleged that no coverage was afforded by its policy and that the arbitrator's conclusion to the contrary was of no effect since the arbitrator was without power to determine such issue. The particular provision of the Allstate policy relied upon by appellee in support of its allegation that no coverage was afforded by such policy provides "(c) With respect to bodily injury sustained by any insured while occupying any automobile, other than the one owned by the named insured, the insurance hereunder shall not apply if the owner of such automobile has insurance similarto that provided for herein.". The provision is not in the language of the usual excess coverage provision i.e. liability in excess of the applicable limits of liability of all other similar insurance but is sometimes characterized as an "escape" provision. However the practical effect is the same since in the usual uninsured motorist coverage, the limits are the minimum required by statute. Such provisions which in effect provide no coverage where there is primary coverage afforded by other similar insurance have been given effect according to their terms. Tidell vs. Farmers Automobile Management Corp., 83 Ill. App. 2d 165, 226 N.E. 2d 397, and Niekamp vs. Allstate Insurance Co., 52 Ill. App. 2d 364, 202 N.E. 2d 126. The Bituminous policy coverage was "other similar insurance" and not only afforded the primary coverage as the arbitrator found but was the only coverage under the "other insurance" provisions of the Allstate policy. That the arbitrator erred in entering an award against appellee was not disputed by appellants in the trial court nor is it

disputed in this court.

Appellants argue that all disputes regarding uninsured motorist provisions including the disputes relating to coverage are properly subject to arbitration. Further that by the terms of Chap. 10, Sec. 112, Ill. Rev. Stat. 1965, commonly known as the Uniform Arbitration Act, awards may not be vacated for mere error.

At the time the briefs were filed in this case there was a conflict in the Illinois cases regarding the question of whether coverage disputes were within the terms of arbitration provisions as the same were commonly employed in resolution of problems under uninsured motorist protection provisions. In Flood v. Country Mutual Insurance Co., 89 Ill. App. 2d 358, 232 N.E. 2d 32, the principal case relied upon by appellants, the court held that arbitration provisions included disputes relating to coverage. In Liberty Mutual Fire Insurance Company v. Loring, 91 Ill. App. 2d 372, 235 N.E. 2d 418, cited by appellee, the court reaches the opposite conclusion. Each of the foregoing cases was decided at about the same time without reference to the other. However this conflict has now been resolved against the contention of Appellants. In September 1968 the Supreme Court in Flood v. Country Mutual Insurance Co, _____Ill. 2d _____, _____N.E. 2d _____, reversed the Appellate decision declaring the Illinois law to be that coverage disputes are not included in arbitration provisions relating to the resolution of disputes arising under uninsured motorist provisions. Arbitration is limited to a determination of the issues of liability of the uninsured third party tort feasor and damage to the insured. Accordingly we believe the Supreme Court case referred to above is dispositive of the issues raised on this appeal.

The Allstate policy provided no coverage under the circumstances and the award based on an issue beyond the authority of the arbitrator to resolve was properly vacated by the trial court.

For the foregoing reasons the judgment of the Circuit Court of Peoria County is affirmed.

JUDGMENT AFFIRMED.

Alloy, P.J. and
Scheineman, J. concur.

52002

103 I.A. 2 486

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JAMES MC DONALD (Impleaded), Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Honorable Edward J. Egan, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

In a two-count indictment, the defendant, James McDonald, and one Frank L. Johnson were jointly charged with attempt burglary and possession of burglary tools. This record is silent as to the disposition of the case against Johnson. The defendant was tried by the court without a jury and was found guilty of attempt burglary. After motions for a new trial and in arrest of judgment were denied, judgment was entered and he was sentenced to not less than two nor more than four years in the Illinois State Penitentiary. In this appeal, the defendant's sole contention is that the State failed to prove him guilty beyond a reasonable doubt. The record discloses these facts.

The State presented five witnesses in support of its case in chief and one in rebuttal. Paul Selan stated that he was associated with Selan's School of Beauty Culture #3 located at 7229 West Lake Street in River Forest, Illinois; that the rear entrance to the store was located adjacent to a large parking lot; that on Sunday, February 20, 1966, the store was not open for business; and that when he arrived on the premises on February 21, 1966, he noticed "the back entrance had been tampered with; the door had had pieces of wood taken out of it by some kind of instrument and the door damaged."

James Coakley, a River Forest police officer, testified that he was on patrol with his partner in their marked squad car at approximately 6:29 P.M. on February 20, 1966; that they were

approaching Lake Street on Bonnie Brae and were observing the large parking lot to the rear of the stores located on the south side of Lake Street immediately west of Harlem Avenue when they saw two individuals at the rear entrance to Selan's Beauty School. The police officers then turned into the parking lot, proceeded across it toward the two men, got to within thirty to thirty-five feet of the suspects, and observed that one of them was applying a device, which appeared to be a bar or stick, to Selan's rear door. Illumination at the scene of the offense was provided by mercury vapor pole lights located in the parking lot in addition to the squad car's headlights and sealed-beam spotlight.

Continuing, Officer Coakley stated that as the spotlight was beamed onto the two suspects, both men turned, walked away from the door, and one of them dropped a bar into an open garbage can. When this witness and his partner, still in their police car, approached to within about thirty feet of these suspects, both men, disregarding the commands of the police to halt, broke into a run and fled the parking lot through a pedestrian gate. The two suspects split up with one running south and the other north. Coakley then identified the defendant in the courtroom as being one of the men he saw at the rear door of Selan's Beauty School on February 20, 1966, and stated that he pursued the defendant as the accused ran north across Lake Street, northwest through a park, and then across Bonnie Brae and Hollycourt where Officer Coakley lost him. Following the tracks of the defendant in the newly fallen snow, Officer Coakley, thirty or forty seconds later, entered the back yard of a residence in the 500 block of Clinton Street and approached the accused, who was catching his breath. At that time, both men were in the back yard and the defendant did not have his back turned to his pursuer. Coakley yelled to the defendant to halt, but the accused disregarded this

command and fled in a westerly direction through a driveway and onto Clinton Street. Coakley fired one shot at the defendant, but missed and lost sight of him. About five minutes later, Officer Coakley, who had been picked up by a police car, saw the man whom he had just pursued, the defendant, in police custody at a police station located approximately six blocks west of where he had last lost sight of him.

On cross-examination, Officer Coakley testified that he was driving the squad car when he and his partner observed the two men behind Selan's. Both men were wearing hats and coats. At that time of the day it was dark as the sun had set. The squad's headlights were on and as the officers proceeded into the parking lot, the spotlight was also on. They directed its beam toward the two men who were at the opposite end of the lot. The two suspects looked toward the squad car as it approached and, according to this witness, the police officers were able to get a profile view of them as the two men walked away from Selan's rear entrance and in front of the approaching police car. When this witness pursued the defendant through the park, he was about forty or fifty feet behind and told him to stop, which command was ignored. Officer Coakley fired one shot into the air at this time but the defendant started to run faster and eventually passed out of sight. Later, Coakley found him again in the back yard.

James Barstatis, a River Forest police officer and partner of Officer Coakley on February 20, 1966, corroborated much of Coakley's testimony and also identified the defendant in the court room as being one of the two men he had seen at Selan's rear entrance on February 20, 1966. After apprehending Frank Johnson who had run south, Officer Barstatis examined Selan's rear door and observed the presence of jimmy marks. He found a crowbar or pry-bar in an empty garbage can located three to four feet from

Selan's rear door.

On cross-examination, Officer Barstatis stated that he had turned on the police spotlight before he and his partner observed the two suspects. He did so as the squad car was going down a residential street, and he was swinging the spotlight across the rear of the businesses located adjacent to the large parking lot. He flashed it onto the two men who were at Selan's rear entrance. As the squad car approached the two suspects, who now were in the glare of the spotlight, Officer Barstatis stated that "McDonald turns around and he has the bar in his hand facing us; we had the lights on, he turned around and faced right into the headlights and spotlight. Then he immediately moved away."

Esther Kruissink testified for the State that on February 20, 1966, at or about 6:30 P.M., she was seated in the front seat of a car parked in a lot attached to a gasoline station at William and Lake Street in River Forest, Illinois. The headlights were on and the front door on the driver's side was open. She heard a great deal of noise behind her and then, within a few seconds, the defendant jumped into the front seat on the driver's side and tried to drive the car away but was unsuccessful. The accused was then apprehended by Sergeant Bailey of the River Forest Police Department. On cross-examination, Mrs. Kruissink stated that the gasoline station was about two and one-half blocks west of Selan's and on the same side of Lake Street. The noise she heard was four boys yelling and chasing the defendant. As they were pursuing the accused, he jumped into the car.

Sergeant William Bailey of the River Forest Police Department testified that he arrested the defendant at or about 6:30 P.M. on February 20, 1966, as the accused was trying to leave the area in the Kruissink car. The defendant told him that he lived at 851 East 75th Street. In response to a question from the prosecution,

Sergeant Bailey said that this address was approximately twenty miles from Selan's Beauty School #3. On cross-examination, Bailey stated that he was in his marked squad car and was searching the area for the burglar when, at approximately 6:30 P.M., he met four boys one block east of the gas station located at William and Lake Streets. They directed his attention to the defendant whom he eventually arrested.

The defendant was the only witness for the defense. He denied that he was one of the men that attempted to burglarize the store and stated that Officer Coakley had chased a man named Charles and not the defendant. He testified that on February 20, 1966, he went to River Forest with Frank Johnson and a man he only knew by the name of Charles. He had met both men in front of Johnson's house and wanted to talk to Johnson about some business dealings as Johnson was in the buy and sell business. Charles was driving and Johnson told the defendant that he (Johnson) was going to pick up some coats, but he did not mention where. The defendant had known Johnson for five years, but he did not know Charles. The accused got into the car and all three men drove to a gas station in River Forest.

The defendant then became leery because they were in a business area and everything was closed. In response to a question from the defendant, Johnson said that they may have to break in a door to pick up some coats. The defendant, being on parole at the time, allegedly became angry when he heard this, walked away, and proceeded into the business district in search of a cab. He then heard two shots and something was happening across the street. Five boys then pulled up in a car and called him over. As the accused approached the car, the boys started to make room for him. Then one of them allegedly made a hostile remark to the defendant, and he walked away from their car but two of the boys

followed him. The accused then started "loping" and in time faced his two pursuers and told them to let him alone as he had a gun. They then said that if he had a gun, they better get the police.

The defendant again started to walk west but became more desperate when he saw the boys talking to some people in a white car. The accused then saw a parked car with its headlights on. He jumped into it for protection and was willing to drive it away because he was not in a normal state of mind. He could not outdistance his pursuers because his thigh bone had been shattered in three places in July, 1965, causing him to have an operation. The accused mentioned the last name and the business address of the physician who allegedly performed this operation, but he did not produce the doctor as a corroborating witness. Rather, the defendant was the sole witness for the defense. In conclusion, the accused did say that as a result of this operation, he was unable to run on his leg at the time the offenses charged in the indictment were committed. He admitted that in 1963, he had been convicted of armed robbery and aggravated battery.

On cross-examination, the defendant stated that after leaving Johnson and Charles, he heard two shots fired but did not see any policemen. Since the accused, a Negro, did not want to leave the business district and enter the surrounding River Forest residential area, he just allegedly paced back and forth on Lake Street until the boys in their car approached him as they were driving east and the defendant was walking west. There was some conversation between them but the defendant denied ever telling them that the police were trying to kill him.

On redirect examination, the defendant denied being a party to the attempted burglary of Selan's and denied having in his possession a crowbar which he used to jimmy the lock.

52002

START HERE - In response to a direction from the court, the State produced, as a rebuttal witness, one of the high school students who happened to meet the defendant in the vicinity of Selan's within minutes after the offense had occurred. Michael Maher, age seventeen, stated that he was in a car with three other boys on February 20, 1966, when they saw the defendant running on Lake Street in a kind of lope or trot. Maher could not remember whether the defendant was running east or west, but the accused was on the south side of Lake Street at the time. The boys stopped their car, asked the defendant what was wrong, and he said that the police were trying to kill him. The accused then continued to run away from their car. The boys got out, lost sight of the defendant as they stopped to talk with one of the policemen in a Maywood squad car which had arrived at the scene, but eventually Maher saw the defendant getting into a car parked in a gas station at Lake and William. This witness and his companion then started to yell "over here." Some squad cars responded and the defendant was arrested. On cross-examination, Maher testified that when he saw the defendant initially, the accused was one block west of Selan's.

On appeal, the defendant contends that he was not proved guilty beyond a reasonable doubt because: (1) his identification was insufficient; (2) the condition of the defendant's leg renders it highly improbable that he was the man that Officer Coakley chased; (3) the trial court failed to consider the time element involved in the instant case; (4) the prosecution's failure to call material witnesses gives rise to an inference inimical to the State's case; (5) the court erred in its rationale of the credibility of the witnesses.

In support of his initial contention, the defendant relies upon People v. Cullotta, 32 Ill. 2d 502, 207 N.E. 2d 444 (1965).

In that case the court reversed a burglary conviction because the identification of the defendant as one of the burglars was insufficient to sustain his conviction beyond a reasonable doubt. But the cited case and the instant case are distinguishable on their facts. In Cullotta, circumstantial evidence was sought to be used to convict the defendant as no one saw him actually participate in the burglary. The defendant denied his guilt, and he also offered an alibi which was corroborated. Furthermore, his alleged accomplice also said the accused was innocent. Two police officers testified that they saw the defendant in a laundromat located adjacent to the burglarized retail shop. The burglary was discovered at 4:30 A.M. and they saw the defendant in the laundromat earlier that same morning between 12:30 and 2:30 A.M. as the policemen drove by on routine patrols. The conviction was reversed due to insufficient identification of the defendant as being the man the policemen had seen in the laundromat two hours before the burglary was discovered. The reviewing court decided that the identification testimony was insufficient because the two policemen had only a fleeting view of the men in the laundromat as they drove by. In addition, it was snowing and except for an instant, when one of the men in the laundromat turned to look at the passing auto, the officers had only a side or profile view of the faces.

In the instant case, direct and not circumstantial evidence, placed the defendant at the scene of the attempted burglary. He was not observed two hours before the offense but was observed participating in the crime. Officers Coakley and Barstatis did not have a fleeting view of the defendant but rather they saw the accused as he was in the glare of the spotlight and headlights of their approaching squad car. They were only thirty to thirty-five feet from the defendant at this time. Coakley did testify that he got a profile view of the defendant as the accused walked

in front of their moving police car, but Barstatis identified the defendant as holding a crowbar and facing directly into the headlights and spotlight of the squad car as it approached. The crowbar was later found at the scene of the offense. Soon after the crime had occurred, Coakley identified the defendant, then in police custody, as being the man he had unsuccessfully pursued from the scene of the offense. The testimony of Officers Coakley and Barstatis was not shaken on cross-examination.

[1] As was stated in People v. Brinkley, 33 Ill. 2d 403, 405, 211 N.E. 2d 730, 732 (1965):

> "Where the identification of an accused is at issue in a criminal case, we have constantly reiterated the rule that the testimony of one witness is sufficient to convict, even though such testimony is contradicted by the accused, provided the witness is credible and viewed the accused under such circumstances as would permit a positive identification to be made. . . ."

[2] In the case at bar, two witnesses for the State identified the defendant as being a participant at the scene of the crime. Their testimony was contradicted by the accused, but their physical observations were made under good lighting conditions and from a relatively short distance. Their credibility was not impeached on cross-examination. Within the facts of this case, the identification of the defendant was sufficient.

[3] The defendant also urges that the condition of his leg renders it highly improbable that he was the man Officer Coakley chased. The defendant did testify that he could not run at the time of the crime due to a thigh operation. He gave the name and business address of the operating physician, but the accused did not offer the doctor as a corroborating witness, nor sought to excuse his absence. The defendant testified that he "loped" to avoid the high school boys who were allegedly harassing him and Michael Maher stated that when he saw him, the accused was running in a kind of "lope" or trot. However, the maximum speed of defendant's "loping"

cannot be determined on the basis of any testimony in the record. Although Officer Coakley did not testify that the man he unsuccessfully pursued from the scene of the offense loped but rather both he and Officer Barstatis stated that the suspect ran, we are not of the opinion that this futile exercise in semantics is sufficient to reverse the defendant's conviction in light of the testimony of two witnesses for the State who identified the defendant at the scene of the crime as being a participant.

[4] Thirdly, the defendant contends that the trial court failed to consider the time element involved in this case. He asks how he could be at Selan's rear door at 6:29 P.M. and then arrested at 6:30 P.M. after being allegedly chased by Officer Coakley. We have reviewed the record and note that all the State's witnesses in discussing exact time of day said "approximately" or "about." Within the fast moving circumstances of this case, such estimations are appropriate.

At the trial of this cause, the defendant was represented by counsel different from that on appeal. In his closing argument to the court, defense counsel admitted that the time sequence could have happened in accordance with the State's evidence. This argument of the defendant on appeal is not persuasive within the facts of this case wherein two police officers identified the defendant as a participant in an attempted burglary.

[5] The defendant also urges that the prosecution's failure to call, as witnesses, Michael Maher's three companions who were in the car with him on February 20, 1966, gives rise to an inference inimical to the State's case. In support of this contention, defendant cites People v. DiVito, 66 Ill. App. 2d 282, 214 N.E. 2d 320 (1966). In that case the court reversed an armed robbery conviction in which the complaining witness did not identify the defendant as one of the armed robbers who allegedly robbed him in

the complainant's apartment. The prosecution also failed to produce as a witness, an eyewitness to the offense. The State offered no reasons to excuse this failure. The only proof connecting the defendant with the offense was the presence of one fingerprint in the apartment. The defendant admitted that he had been in the apartment once on a social visit but denied his guilt of the offense charged. Reversal was based, in part, upon the failure of the prosecution to call, as its witness, an eyewitness to the armed robbery or explain why he was not called.

But the cited case and the instant case are distinguishable on their facts. In the case at bar, the State did not fail to produce one of the boys who saw the defendant on February 20, 1966, shortly after the offense was committed, but rather called one of them as its witness in rebuttal. The court asked that this be done and only requested one of the boys, not naming which one. The State met the court's direction. There is no showing in this record that the other three boys would have added anything new and significant to the testimony of Michael Maher. Their testimony might have been only cumulative, repetitive, and time-consuming. Perhaps that is why the court only directed the State to call one of them, without naming which one. Furthermore, the State had given defense counsel a list of witnesses whom the State could call at the trial, and the names and addresses of the other boys were on this list. If defense counsel wanted them to testify, he could have subpoened them. We are not persuaded by this argument within the facts of this case.

(5) Finally, the defendant urges that the trial court erred in its rationale of the credibility of the witnesses. The trial court stated that it believed the prosecution witnesses because the defendant's story was inherently improbable. Such a statement might seem to require the defendant to prove his innocence rather

52002 → set and insert material on gal 1159

than that the prosecution must rebut the defendant's presumption of innocence and prove him guilty beyond a reasonable doubt. However, we have examined the evidence presented by the prosecution in this case and are of the opinion that the defendant was proved guilty beyond a reasonable doubt. Two police officers identified the defendant as being at the scene of the attempted burglary and being an active participant therein. One of them said that the defendant faced into the glare of the headlights and spotlight of their approaching police car, and he was holding a crowbar at the time. A crowbar was later found at the scene of the crime. The State's evidence was sufficient in this case to prove the defendant guilty beyond a reasonable doubt.

Accordingly, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and MC NAMARA, J., concur.

393